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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 352

J. LAURITZEN,

Petitioner,

—against—

ROBERT SPANN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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On the Petition

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—against—
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No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on April 19, 1965.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 344 F. 2d 204. The opinion of the District Court is reported at 237 F. Supp. 569. Both opinions are reprinted in the appendix hereto.*

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1965. The jurisdiction of this Court is in-

*References to the appendix herein are by the letter "a".

voked under 28 U. S. C. Section 1254 (1) and 28 U. S. C. 2101 (c).

Questions Presented

1. Does the admiralty jurisdiction and maritime law embracing the warranty of seaworthiness apply to a shore-side worker injured on the pier by a claimed defective appliance located on the pier and unattached to any vessel?
2. Does the decision of the Court below broaden the shipowner's warranty of seaworthiness to include individuals and equipment not encompassed within, or contemplated by, decisions of this Court?

Statutes Involved

The only statute involved is the Admiralty Extension Act, 46 U. S. C. § 740 (1948).

Statement of the Case

Federal jurisdiction in the first instance is based on diversity of citizenship under Title 28 U. S. C. 1332, between Robert Spann, a citizen of the State of Pennsylvania and J. Lauritzen, a Danish shipowner.

The facts of the accident are largely undisputed and a great many of them form a part of the stipulations entered into between the parties. (Appendix pp. 22a-24a).

Respondent was a longshoreman employed by T. Hogan Corporation at the Camden Marine Terminal, Camden, New Jersey (p. 18a). On the day of his accident, a cargo of nitrate of soda was being discharged from petitioner's Danish flag vessel, the m/s Tenna Dan by means of a shore-based crane and bucket, (See photograph 10 p. 28a),

which would then swing around and deposit the load into a hopper on the pier. The crane, which was on tracks on the pier, was owned and operated by Camden Marine Terminal, (Stipulation 7, p. 23a). Respondent worked on the hopper, which was owned by Lavino Shipping Company, (Stipulation 1, p. 22a) and which "was not attached to the vessel in any way." Court of Appeals opinion p. 7a (See photographs 1 and 2, pp. 25a-26a).

It was respondent's function to manipulate a heavy horizontal bar while standing on a catwalk so as to open and close the hopper and release the bulk cargo of nitrate of soda into a waiting truck below. (Photograph 5, p. 27a).

In plaintiff's own language (p. 19a) his job was:

> "Q. O. K. And what was your job on the dock, Mr. Spann?
>
> A. Loading trucks from the hopper."

p. 20a:

> "Q. Well, tell me how you got hurt.
>
> A. Well, I was up there. I was loading a truck, and when I got through loading that truck I said, 'Go ahead.'
>
> Q. To the truck driver?
>
> A. That's what I said to the truck driver.* * *"

Plaintiff claims injury as a result of a premature downward movement of the bar, caused by a defective release mechanism. This is the unseaworthiness on which the Court of Appeals said "The disposition of the appeal depends * * *." (p. 7a).

On the foregoing facts, petitioner moved for summary judgment which was granted by the Honorable William

H. Kirkpatrick* in a written opinion (p. 1a). The District Judge found that plaintiff was (1) not doing any traditional ship's work; that he was engaged, in his own language, in loading a truck, and (2) that the hopper was not, in the language of this Court in *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206, 213 (1963) something "about a ship whether the hull, the decks, the machinery, the tools furnished, the stowage or the cargo containers. . . ."

The Court of Appeals, after brushing aside the jurisdictional question (p. 8a) recast both tests in far broader terms and held, as a matter of law, (p. 12a) "that plaintiff was engaged in unloading the ship" and (p. 17a) that the hopper was "a part of the appurtenances to the vessel." In so doing, the Third Circuit expressed its agreement with the Ninth Circuit in *Huff* v. *Matson Navigation Company*, 338 F. 2d 205, (1965) cert. denied 380 U. S. 943 (1965) and opposed to the Sixth Circuit view as expressed in *McKnight* v. *N. M. Paterson & Sons, Ltd.*, 181 F. Supp. 434 (D. C. Ohio, 1960) aff'd. 286 F. 2d 250 (6 Cir., 1960), cert. denied 368 U. S. 913 (1961), and the Second Circuit in *Forkin* v. *Furness Withy & Co.*, 323 F. 2d 638 (2 Cir., 1963), specifically stating (p. 16a):

> "We agree with the Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles announced by the Supreme Court."

Underscoring much of the reason of the Court below was its interpretation of this Court's decisions, as to the importance of humanitarian considerations in cases of this kind.

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*The same judge before whom, interestingly enough, all this began twenty years before in *Sieracki* v. *Seas Shipping Co.* 57 F. Supp. 724 (E. D. Pa., 1944).

Reasons for Granting the Writ

1. Conflicts among the Courts of Appeals.

There is irreconcilable conflict, if not utter confusion, among the Circuits as to the inland reach of the warranty of seaworthiness, requiring resolution by this Court. The Court of Appeals for the Third Circuit recognized this in its opinion (p. 16a), citing agreement with the *Huff* case, supra, and disagreement with the *McKnight* and *Forkin* cases. All involved a claim of unseaworthiness of shore based equipment not belonging to the vessel. Thus, over one third of the Circuits in the federal judicial system have become embroiled in this controversy.

This Court is presented with a situation much the same as in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 542 (1960), where certiorari was granted "to consider a question of maritime law upon which the Courts of Appeals have expressed differing views".

2. The decision below judicially extends the maritime jurisdiction to a degree without precedent.

The decision below presents a significant question as to the limits of maritime jurisdiction, and the concomitant question of the application of maritime or local law. This Court has treated these issues as coincidental, stating in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), where the law of New York was held inapplicable to an injury aboard a ship on navigable waters:

> "The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measured by the standards of maritime law."

A cause of action for unseaworthiness is "rooted in federal maritime law", *Pope & Talbot Inc.* v. *Hawn,* 346 U. S. 406, 409 (1953), and is a maritime tort, *Pope & Talbot Inc.* v. *Hawn,* supra, p. 409; *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206, 209-210 (1963).

There are no decisions, either cited by the Court of Appeals below or within petitioner's knowledge, where the martime law has been applied to warrant the seaworthiness of equipment on the pier where the tort or claimed unseaworthy condition both originated on the pier, and found its culmination in an injury on the pier. This case goes beyond *Gutierrez,* supra, where this Court said (p. 209) "we brought the case here, * * * to resolve the apparently troublesome question as to the shipowner's liabilities for his torts which have impacts on shore."

The shipowner was held, under the Admiralty Extension Act of 1948, 46 U. S. C. 740, to warrant the condition of cargo containers which had been unloaded from the vessel to the pier. Significantly, the shipowner was not held to warrant the seaworthiness of the pier itself, but only that which emanated from aboard the vessel. This is in keeping with the language of the Admiralty Extension Act, which applies when the wrong is "caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land".

House Report No. 1523, 1948 U. S. Code Congressional Service, Page 1899, observed that prior to the bill to extend admiralty jurisdiction, there was no maritime cause of action for injuries ashore:

> "Under existing law, admiralty and maritime jurisdiction in respect of claims arising out of maritime torts is extended by the United States courts to only those cases where injury is done upon navigable waters not to those where injury is done to

> persons or property situated upon land, even though the injury is caused by a vessel situated on navigable waters.

Under the Act, the injury must still be "caused" by a vessel, or as this Court held in the *Gutierrez* case, supra, p. 210, the Act applies when "the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." It is submitted that the District Court was entirely accurate when it said that the insrumentality causing the injury must be, in the language of *Gutierrez,* something "about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers."

Oniy an extraordinary and unnecessary tugging on boot straps would fictionally annex the hopper back to the vessel so that the tort could then come forward from the vessel to the pier under legitimate maritime auspices.

Rather than meeting this issue squarely, the Court below, after pointing out (p. 8a) that "subordinate federal courts have encountered difficulty in drawing the line where maritime jurisdiction ends, * * *" swept aside further consideration of the jurisdictional question by pointing out rather vaguely that this Court "has repeatedly rejected efforts to distinguish or limit the broad range of its protection."

A contrasting decision is *Kent* v. *Shell Oil Company,* 286 F. 2d 746 (5 Cir., 1961), where a truck driver was helping unload his truck into a barge used by Shell Oil Company. Pipes were rolled from the truck to the barge by means of skids. Due to the way the pipe was stowed, secured or handled on the truck, some pipe was caused to roll on plaintiff. Similar backwards-forwards reasoning, as

indulged in by the Court below, would have annexed the skids, the pipe and/or the truck backward to the vessel as appurtenances, and then move forward to the pier with maritime credentials.

The Fifth Circuit pointed out that the plaintiff therein was unloading a truck, as respondent herein admitted he was loading a truck (p. 19a). Further, as here (p. 750), "Nothing the barge or tug did caused the pipe to roll or move." The Court then found that "This means that the 'injuries' were non-maritime in nature", and went on to say "The extension of admiralty jurisdiction statute, 46 U. S. C. A., § 740, does not therefore make a classic non-maritime, land based injury into something else."

The Fourth Circuit has also denied the application of maritime law to pier injuries in *Hastings* v. *Mahon,* 340 F. 2d 910 (4 Cir., 1965); cert. denied 380 U. S. 963 (1965) Hastings was injured on a launching ramp while attempting to put his small boat in the water. Deeming the ramp an extension of the pier and finding the Admiralty Extension Act inapplicable, the Court relied for its decision on long standing principles (p. 911).

> "The traditional distinctions remain, however, to limit Admiralty's jurisdiction when the instrumentality which caused the wrong was not a vessel on navigable waters."

Although the Court of Appeals has scarcely touched upon the jurisdictional question, the problem has to be met here as it was by this Court in the *Gutierrez* case, 373 U. S. 206, 209, where this Court considered the problem even though it had not been raised below. Depending on whether or not this action is within maritime cognizance, will also determine whether the maritime concept of seaworthiness or local law applies. A like important consideration moti-

vated the granting of the writ in, for example, the *M/V Tungus* v. *Skovgaard,* 358 U. S. 588, 590 (1959). "Certiorari was granted primarily to consider the relationship of maritime and local law in cases of this kind."

3. The Court below has set forth criteria for application of the warranty of seaworthiness beyond that expressed in any decision of this Court.

Logically followed, a ship can now be held liable for virtually all pier equipment and personnel. It is submitted that this Court should grant the writ herein in order to restore some semblance of order or symmetry, and some realistic meaning to the term *seaworthiness** in so far as it applies to shoreside accidents, not only for the guidance of the lower courts, but the maritime bar and the litigants themselves. While petitioner believes that the bounds of this very difficult concept have been rendered reasonably discernible by previous decisions of this Court, The Court of Appeals has seen fit to employ as its touchstone the all embracing terminology of "in the service of the vessel" and then proceeds, by boot strap reasoning, to deem the hopper an appurtenance of the vessel because used in that service.

Actually, there is precious little in any pier inventory, from paper clips to broom handles, or in personnel, from clerks to truck drivers, that is not in some sense in the service of one ship or another. Indeed, the very pier itself is in that service, for without ships, what need have we of piers? They are not often scenic.

The truck driver, truck, skids and pipe in *Kent* v. *Shell Oil Company,* 286 F. 2d 746 (5 Cir., 1961), were all in the enlarged sense, in the service of loading the barge. The

*Here applied both to a man and an item of equipment which do not go to sea.

cargo checker in *LiMandri* v. *Lloyd Brasileiro,* 316 F. 2d 3 (2 Cir., 1963), while not checking cargo for any ship then at the pier, had to be performing his service for some ship. Under the Third Circuit view, whatever ship was being discharged at Pier 84, New York, in *Fredericks* v. *American Export Lines,* 227 F. 2d 450 (2 Cir., 1955) cert. denied 350 U. S. 989 (1956) could be held liable for the defective skid on the pier. The hi-lo operator on the pier in *Delaney* v. *Towmotor Corporation,* 339 F. 2d 4 (2 Cir., 1964), would be in the service of whatever vessel whose cargo he fortuitously happened to be moving at the moment of his injury. The defective hi-lo would follow as an appurtenance of the vessel.

The progression from the reasoning of the Court below to the foregoing eventualities is not remote or unnatural. The reasons given and the policy urged would logically put every person or every item on the pier somehow "in the service of the vessel" and therefore within the ambit of the warranty as redefined below.

Nor is it consistent to limit the imposition of the warranty to times when the ship is actually present at the dock, for again, if cargo is being handled before arrival or after departure, all the reasons and policy announced below would place both the individual and equipment involved in the service of the vessel whether present or not. Thus, assuming (1) that no more trucks were available until after lunch, (2) that the hopper was still full of nitrate, (3) that the ship left after completing discharge at 11 a. m. (Stipulation 8, p. 23a), what rational difference would it have made to the decision below if respondent were injured at 1 p. m.

An analysis of this Court's decisions does not, however, disclose so broad or so unrestricted an application of the warranty as the Court of Appeals would impose. It has

not been held to extend beyond those men or that gear which stand in for ship's personnel or equipment.

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 99, (1946), this Court outlined the policy behind the extension of the warranty to longshoremen:

> "It is that for injuries incurred while working on board the ship in navigable waters, the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman, because he is doing a seaman's work and incurring a seaman's hazards."

Can it be maintained that respondent here was, as a matter of law, doing a seaman's work and incurring a seaman's hazards?

Similar identification of seamen and longshoremen as to work performed and hazards risked appears in *Pope & Talbot Inc.* v. *Hawn,* 346 U. S. 406, 409, where this Court said of a marine carpenter:

> "But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water."

and further with respect to both seamen and longshoremen: (p. 413)

> "All were subjected to the same danger. All were entitled to like treatment under law."

United New York and New Jersey Sandy Hook Pilots Association v. *Halecki,* 358 U. S. 613 (1959), held that the decedent therein was not entitled to the warranty since

not performing traditional ship's work. Halecki had been an electrician, but this Court held that such labels were (p. 618) "meaningless", just as terming respondent herein a longshoreman or member of a gang is also without value in determining whether he was doing traditional ship's work. "Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship. . . ." *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 413.

Against the District Court's conclusion, that what respondent was doing was loading trucks and not discharging the ship (p. 4a), the Court of Appeals concluded "it is clear that plaintiff was engaged in unloading the ship." (p. 12a). Not being as sophisticated in such matters and unencumbered by a legal education, respondent in his examination before trial stated in the straightforward language to which the layman frequently falls prey:

> "Q. O.K. And what was your job on the dock, Mr. Spann?
> A. Loading trucks from the hopper."

P. 20a:

> "Q. Well, tell me how you got hurt.
> A. Well, I was up there. I was loading a truck, and when I got through loading the truck I said 'go ahead'."

Reinforcing both the decisions of the District Court and the respondent's own testimony, is a simple examination of the contour of the hopper as shown in Photographs 1 and 2 (p. 25-26a) which reveals its function. The bulk cargo is funneled from a large opening to a small one in order to obtain a controlled, even and regular distribution in the truck below. This is undoubtedly of distinct service

to the consignee of the cargo and the trucker, while being of little benefit to the shipowner, who must accomodate the discharge of the cargo to the size of the truck, rather than, for example, discharging it directly and more expeditiously into a large bin on the pier.

In holding that the use of modern machinery or labor saving methods cannot deprive the longshoreman of his rights gained by performing traditional ship's work, the Court of Appeals slips into another fallacy. Unlike the cases cited in support of its theory, there is no showing as to what traditional seamen's work the hopper replaced, nor, what, prior to the hopper, the vessel would have traditionally warranted as its seaworthy appurtenance on the pier.

Viewing plaintiff's function on the pier, it is evident that it was a matter of total indifference to him where the cargo came from. He could be concerned only with the crane and bucket filling the hopper and with his own emptying the hopper into the truck. Whether the nitrate of soda came from the ship, from a bin on the pier, from a railroad car, from a barge to which the ship had discharged it, or alternately from two different ships (which would pose an interesting problem as to which vessel the defective hopper fortuitously made unseaworthy), all had no bearing on respondent's function.

Such illustrations only point up how destructive of concepts of law a decision may be which is forced in the name of humanitarianism, or how under this talismanic language, a legal alchemy takes place whereby a defective structure on the pier, unconnected with the ship either physically or functionally, which is neither an appurtenance of the vessel nor a substitute therefor, and which is obviously used to assist in distributing a bulk load throughout a truck, is transmuted into a part of a vessel. One can almost visualize the look of delighted incredulity bestowed by respondent upon his counsel when advised that

the Court of Appeals had ruled that the hopper was, in the eyes of the law, part of ship's equipment.

But while the Court of Appeals would consider the hopper a ship's appurtenance for purposes of the warranty of seaworthiness, would it also logically deem it an appurtenance for purposes of the vessel owner's filing a petition for limitation of liability, under 46 U. S. C. 181 et seq.? Petitioner thinks not, and properly so, for the question suggests the illogic of calling the hopper a ship's appurtenance for any purpose.

The Court below has rested its decision largely on what petitioner believes to be a misinterpretation of this Court's decisions as to humanitarian considerations. p. 8a "The Supreme Court, however, has repeatedly rejected efforts to distinguish or limit the broad range of its protection." However, from the outset in *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 80, 95, this Court has used limiting language in defining the warranty, "It is a form of absolute duty owing to all ***within the range*** of its humanitarian policy." (Emphasis added), and the range has been generally laid out.

An unbridled humanitarianism would have sloughed off the argument that a deactivated ship does not warrant its seaworthiness, and permitted recovery to repairman *West* in his action against the *United States,* 361 U. S. 118 (1959). It might have been even more humanitarian to permit a recovery to the widow of Walter *Halecki,* in her action against the *United New York and New Jersey Sandy Hook Pilot's Association,* 358 U. S. 613. Yet this Court pointed out (p. 617)

> "Neither these decisions nor the policy that underlines them can justify extension of liability for unseaworthiness to the decedent in the present case."

Similar considerations would have tolerated an additional cause of action to *Joseph Kermarec* on his visit

aboard the s/s Oregon, 358 U. S. 625 (1959), but as this Court observed, as a visitor aboard ship, he was not within the class intended to be benefited, nor performing any ship's work (629).

The nice distinctions drawn in *Morales* v. *City of Galveston,* 370 U. S. 165 (1962), in denying the warranty of seaworthiness to a longshoreman poisoned by a noxious fumigant in the hold, do not substantiate a single-minded effort by this Court to enlarge the warranty at every opportunity.

Finally, if humanitarian considerations be overriding, there was little justification for this Court to deprive seaman *Gillespie's* widow of a cause of action for wrongful death for unseaworthiness, when the estates of neo-seamen possess such a right. *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148 (1964).

Ticking off various tests utilized by this Court over the years, it seems evident that respondent was not under any ship's discipline as in *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, 103 (1944); he was not incurring any seamen's hazards as in *Sea Shipping* v. *Sieracki,* 328 U. S. 85, 99; he was not performing any delegated ship's duty as discussed in *United New York and New Jersey Sandy Hook Pilot's Association* v. *Halecki,* 358 U. S. 613, 617; he did not "depend" on the ship furnishing him with seaworthy gear as described in *West* v. *United States,* 361 U. S. 118, 121; he was not injured in any real sense of the word by an "appliance appurtenant to the ship" as intended by *Crumady* v. *"Joachim Hendrik Fisser",* 358 U. S. 423, 427 (1959), and finally he apparently will not "shoulder his loss alone", *Reed* v. *The Yaka,* 373 U. S. 410, 413, for he possesses, and indeed has brought a separate action, against the owner of the defective hopper, Lavino Shipping Company, in the Court of Common Pleas No. 6, Philadelphia County, March Term 1965, No. 5994.

Under the circumstances, it is submitted that all the reaching and stretching attempted by the Court below, premised on humanitarian grounds, finds no support at all in this Court's decisions, and succeeds only in further blurring the outlines of this already amorphous body of law.

This Court has twice had occasion to reflect on the legitimacy of the doctrine both in *United New York And New Jersey Sandy Hook Pilot's Association* v. *Halecki,* 358 U. S. 613, 616, and in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 550. While it is certainly with us, and useful within its proper sphere, it is also demonstrated a capacity to consume itself as exemplified in two recent decisions. Thus in *Gillespie* v. *U. S. Steel,* 379 U. S. 148, 1964, the widow of a deceased seaman was denied a cause of action for wrongful death for unseaworthiness, whereas the widow of a longshoreman, whose only recommendation for the warranty is a certain identity as a seaman, would have recovered. In *Pisano* v. *A/S Inger,* F. 2d (2 Cir., June 7, 1965), a longshoreman who himself created an unseaworthy condition, was permitted to recover for one exhilarating moment, until the Court ruled that he was guilty of comparative negligence to the extent of 100%.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

July 16, 1965.

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Decision of District Court

UNITED STATES DISTRICT COURT

E. D. PENNSYLVANIA.

Civ. A. No. 33701.

Jan. 31, 1964.

ROBERT SPANN

v.

J. LAURITZEN.

KIRKPATRICK, District Judge.

This is a civil action by a longshoreman, a member of a gang, employees of T. Hogan Corporation, the stevedore, engaged in the unloading of the defendant's vessel, to recover for injuries against the shipowner. The plaintiff's claim is based upon (1) unseaworthiness and (2) negligence. The defendant has moved for summary judgment.

I find that the following facts are uncontroverted:

At the time of the plaintiff's injury a bulk cargo of nitrate of soda was being discharged by a shore based crane. The crane would lower its bucket into the hold, pick up a load of nitrate, swing it around and drop the nitrate into a hopper on the pier. The hopper, which was owned by Lavino Shipping Company, was a piece of equipment, roughly funnel shaped, the opening at the top being 14′ x

11'. When full, it held eight buckets of nitrate, each bucket holding 1¼ cubic yards. The hopper stood on the pier and was not attached to the vessel in any way. It rested on supports which raised it sufficiently high above the floor of the pier to allow a truck to drive under it. The empty trucks would move under the hopper, and it was the plaintiff's job to open the floor of the hopper and let the nitrate which had been discharged into it run out and into the truck waiting below to be filled. This he did by pulling down a heavy horizontal bar or handle. Five buckets of nitrate make a truckload. When the truck was filled, he would close the floor so that it would receive and hold the next load of nitrate.

The plaintiff was injured by a sudden premature downward movement of the handle, which he contends was improperly secured in the raised position.

The many, and sometimes hard to reconcile, decisions upon the subject bear witness to the difficulty which the courts have met in suits by injured longshoremen in attempting to draw the line at which maritime jurisdiction ends.

Various tests have been suggested, frequently only to be discarded as new circumstances were presented. Thus, it is not conclusive, although it may be evidentiary, that the injury was incurred while the plaintiff was not on the ship but working on the dock alongside. *Strika* v. *Netherlands Ministry of Traffic,* 2 Cir., 185 F. 2d 555. Nor is it of great importance that the instrumentality causing the injury was not owned by the shipowner (*Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798) or that the place where the injury occurred was not under his control. *Feinman* v. *A. H. Bull Steamship Co.,* 3 Cir., 216 F. 2d 393. That the thing which injured the plaintiff be attached to or even in physical contact with the

ship, often an important consideration, does not appear to be a sine qua non of maritime jurisdiction. *Robillard* v. *A. L. Burbank & Co., Ltd.,* D. C., 186 F. Supp. 193.

The most recent pronouncement of the Supreme Court upon the subject is to be found in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206, 83 S. Ct. 1185, 10 L. Ed. 297. In that case the injury was caused by the plaintiff's slipping on beans scattered about the surface of the pier. The beans got there because the bags in which they had been stowed on board the ship were defective and the beans spilled out of the bags during unloading. The Court held that the defective condition of the bags rendered them *and the ship* unseaworthy, thus extending the duty to provide a seaworthy ship and gear to containers in which the cargo is stowed on board.

From the cases bearing on the point there would seem to emerge a rule applicable to this case, which can be stated somewhat as follows: In the case of a longshoreman injured on shore, while the ship is being unloaded, two things are needed for him to recover for the maritime tort of unseaworthiness. First, the plaintiff must be engaged in "traditional crew work" which in most cases would mean helping to discharge the cargo. Second, the instrumentality causing the injury must be something "about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers," *Gutierrez* v. *Waterman Steamship Corp., supra.* Where the cause of the injury is a defect in a piece of equipment used in unloading, it should be, if not attached to the vessel, adopted at least temporarily as part of the ship's gear. *Reed* v. *Steamship Yaka,* 373 U. S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448.

In the present case, as in most of the cases, the nature of the work being done and the character of the instru-

mentality being used coincide. Thus, in the present case it is critical whether this plaintiff at the time he was injured was engaged in unloading the ship or in loading a truck, because loading trucks on shore is not a sailor's work, and if that is what he was doing not only would he lose the protection accorded to longshoremen doing the work of seamen by the *Sieracki* case (*Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099) but the nature of his work would have a bearing upon the character of the thing which injured him, namely, the hopper. However, the physical character of the piece of equipment causing the injury may in itself be decisive of the question of its adoption as part of the ship's gear. What the Court, in *McKnight* v. *Paterson and Sons, Ltd.,* D. C., 181 F. Supp. 434, 439, said about a shore based crane applies fully to the hopper in the present case, "Both its size and sole function rebel against any argument that a ship might 'adopt' or 'integrate' such equipment as part of its gear."

On the whole, I think that the operation of discharging the cargo or the portion of it with which the plaintiff was concerned had ended when the nitrate was dumped upon the floor of the hopper. The plaintiff argues that the hopper was, in fact, a cargo container, also an instrumentality selected by the stevedores to expedite the discharge of the cargo. I have come to the conclusion that it was neither. The nitrate was accumulated in the hopper for the purpose of conveniently loading the trucks and its use was for the benefit of whoever was to take the nitrate away from the dock. It could have been put on the floor of the dock and loaded into trucks or cars with shovels, or the dock may well have had a second story where the nitrate could have been placed and then shovelled through a trapdoor into a

truck below, and it seems apparent that in neither case would the dock have become something "about a ship." Nor can I regard the hopper as a cargo container any more than the clam bucket which lifted the nitrate or the floor of the dock upon which it might have been placed. If it was a container of anything, it was a container of material which had been cargo but which, having become disassociated from the ship, could no longer be so described.

A case which deals with the precise point of law here involved and which is, therefore, dispositive of this case is *Fredericks* v. *American Export Lines,* 2 Cir., 227 F. 2d 450. In its opinion, the Court said, page 454, "Finally, while in recent years the warranty of seaworthiness has been held by the Supreme Court to cover a pretty wide territory * * * nevertheless, here the injury was incurred by a longshoreman standing on a pier, as a result of the failure of a defective appliance located on the pier and furnished by a subcontractor. No decision so far has extended the sweeping protection of the seaworthiness doctrine to this situation. No vessel was connected with the accident."

Upon the issue of negligence, having determined that the hopper was not part of the ship's gear or appurtenant appliances, it follows that the shipowner was under no duty to inspect or maintain it and, therefore, cannot be held negligent in respect of injury caused by it.

The defendant's motion for summary judgment is granted and judgment may be entered accordingly.

Decision of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14840

ROBERT SPANN,

Appellant

v.

J. LAURITZEN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 9, 1964

Before KALODNER, GANEY and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed April 19, 1965)

By FREEDMAN, *Circuit Judge*

Plaintiff, a longshoreman, was employed by a stevedoring company as a member of a gang engaged in unloading a vessel. He brought suit against its owner to recover for injuries sustained because of the alleged unseaworthiness of the vessel and the negligence of the shipowner. The

disposition of the appeal depends on the question of unseaworthiness.

The learned District Judge granted defendant's motion for summary judgment on facts which are undisputed. They are well summarized in his opinion: "At the time of the plaintiff's injury a bulk cargo of nitrate of soda was being discharged by a shore based crane. The crane would lower its bucket into the hold, pick up a load of nitrate, swing it around and drop the nitrate into a hopper on the pier. The hopper, which was owned by Lavino Shipping Company, [and was being operated by the stevedoring company] was a piece of equipment, roughly funnel shaped, the opening at the top being 14′ x 11′. When full, it held eight buckets of nitrate, each bucket holding 1¼ cubic yards. The hopper stood on the pier and was not attached to the vessel in any way. It rested on supports which raised it sufficiently high above the floor of the pier to allow a truck to drive under it. The empty trucks would move under the hopper, and it was the plaintiff's job to open the floor of the hopper and let the nitrate which had been discharged into it run out and into the truck waiting below to be filled. This he did by pulling down a heavy horizontal bar or handle. Five buckets of nitrate make a truckload. When the truck was filled, he would close the floor so that it would receive and hold the next load of nitrate." (237 F. Supp. 569, 570 (E. D. Pa. 1964)).

Plaintiff was injured when a bucket load of nitrate was dropped into the emptied hopper and caused a sudden premature downward movement of the handle, which struck him. He contends that this was caused by a defective release mechanism on the hopper.

Ever since the Supreme Court in *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 80 (1946), extended the protection of the seaworthiness doctrine to longshoremen engaged

in the service of the vessel, subordinate federal courts have encountered difficulty in drawing the line where maritime jurisdiction ends, and in some instances have expressed misgiving at the scope which the Supreme Court has given it in subsequent cases. See e.g., *Rogers* v. *United States Lines,* 205 F. 2d 57 (3 Cir. 1953); *Forkin* v. *Furness Withy & Co.,* 323 F. 2d 638 (2 Cir. 1963); *Reid* v. *Quebec Paper Sales & Transportation Co.,* 340 F. 2d 34 (2 Cir. 1965), dissenting opinion of Friendly, J. The Supreme Court, however, has repeatedly rejected efforts to distiguish or limit the broad range of its protection. Recently, in *Reed* v. *The Yaka,* 373 U. S. 410, 413 (1963), the Court summed up the policy underlying the view it had expressed in prior cases: "[In] *Seas Shipping Co.* v. *Sieracki* . . . we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. . . . We further held that the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation." (p. 413). In effectuating its policy the Court has held that it is not material that the longshoreman was injured on land (*Gutierrez* v. *Waterman SS Corp.,* 373 U. S. 206 (1963)), or that the defective equipment was owned and supplied by the stevedore (*Alaska SS. Co.* v. *Petterson,* 347 U. S. 396 (1954); *Rogers* v. *United States Lines,* 347 U. S. 984 (1954)), or that an unseaworthy condition created by the stevedore was transient and the shipowner had neither actual nor constructive knowledge of it. *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 549 (1960). In the *Reed* case, *supra,* a long-

shoreman was allowed to recover from the shipowner for unseaworthiness due to a defect in wooden pallets which were used in loading the ship, even though the shipowner was also the stevedoring company which hired the longshoreman. The same concern for the welfare of longshoremen is at the foundation of the Supreme Court's decisions which have held the shipowner entitled to indemnity from the stevedoring company. Thus, in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 376 U. S. 314 (1964), a shipowner, which had been held liable for unseaworthiness, was permitted to recover indemnity from a stevedoring company, which employed the injured longshoreman, for breach of the implied warranty of workmanlike service even though there was no negligence by the stevedore.

We have sought to effectuate these views of the Court. See, e.g., *Ferrante* v. *Swedish American Lines,* 331 F. 2d 571 (3 Cir. 1964); *Thompson* v. *Calmar Steamship Corporation,* 331 F. 2d 657 (3 Cir. 1964), cert. denied 379 U. S. 913.

It is in this context that we must answer the two questions presented by this appeal: (1) was plaintiff engaged in the service of the vessel, and (2) does a large shore based hopper have sufficient connection with the ship to be within the subject matter of the warranty of seaworthiness.

(1) The Court below held in effect that since the cargo was removed from the vessel by a large crane over which the owner of the vessel had no control, and the cargo was then dropped into a hopper designed to facilitate the loading of trucks and not in some storage place to be picked up by the consignee, the longshoreman who attended

to the opening and closing of the hopper was engaged in loading the trucks and not in unloading the cargo.

This is, of course, a close case. But since the hopper held only eight bucket loads of nitrate it is clear that the hopper had to be emptied repeatedly in order to make room for the crane to dump the subsequent bucket loads which it dug out of the vessel. Clearly the maritime jurisdiction extended to the act of reaching into the vessel and removing cargo. Such removal, having a beginning, had to have an end. If the cargo had been delivered on a second story of the pier, as the court below suggested, the longshoreman injured in the course of the crane's reaching into the vessel, removing bucket loads and dumping them on to the second floor of the pier, would have been within the protection of the maritime jurisdiction. He is no less so because modern ingenuity suggested the desirability of combining the unloading of the vessel with the loading of the trucks. It has frequently been said that the doctrine of unseaworthiness is not to be rigidly construed so as to exclude from its scope modern labor saving methods and the use of modern machinery to do the work traditionally done in loading or unloading vessels. *Huff* v. *Matson Navigation Company* 338 F. 2d 205 (9 Cir. 1964); *Rodriquez* v. *Coastal Ship Corporation,* 210 F. Supp. 38 (S. D. N. Y. 1962). The labor saving method here used which facilitated the removal of the cargo by motor vehicles may not be held to eliminate the unloading of the cargo from the area of traditional work of the seamen in the service of the vessel.

That the completion of the unloading of a vessel is within the traditional work of the seaman is illustrated in a number of our cases. In *Hagans* v. *Ellerman & Bucknall Steamship Company,* 318 F. 2d 563 (3 Cir.

1963), plaintiff was a member of a twenty-two man gang engaged in unloading a cargo of sand from a ship. After the bags of sand were discharged from the ship they were loaded onto four-wheeled flat cars and towed to a pierside warehouse for temporary storage. Plaintiff was removing the bags from the flat cars and piling them on the warehouse floor when he slipped on sand which had escaped from the bags. Notwithstanding defendant's claim that plaintiff was merely stacking the bags for transshipment we held as a matter of law that plaintiff's work was in the service of the ship: "They were the same bags handled by his fellow longshoremen who had started the process of discharge of the cargo in the hold of the vessel. The pier apron could not contain the large number of bags which, in any event, had to be protected from the weather, by being placed within the pier building. The conclusion is inescapable that Hagans performed an integral part of the unloading of the vessel and thus as a matter of law he was in the ship's service." (p. 571).

In *Thompson* v. *Calmar Steamship Corporation,* 331 F. 2d 657 (1964), we sustained recovery by a plaintiff longshoreman who was injured while engaged in the movement of freight cars which were propelled by the ship's line into a position where their cargo could be loaded onto the ship. The opinion of the District Court in that case shows the vigorous contention made and rejected, that it would be incongruous to construe work on a loaded freight car to be in the service of the ship: "It will not do to isolate from the over-all circumstances the fact that the plaintiff happened to be on a loaded freight car and then plead the seemingly strange extravagance that a workman on a freight car is held to be engaged in the traditional work of a seaman. In isolation such a plea may sound appealing. In the circumstances it is unfounded. Plaintiff

was not a member of a railroad crew which brought a railroad freight car on to the pier. He was, on the contrary, a member of a longshoremen's gang engaged in loading a vessel, and in the course of doing so it fell to him to participate in an operation on land, but one intimately a part of the use of the ship's equipment, i.e. the bull winch and the bull line." (216 F. Supp. 234, 238 (E. D. Pa. 1963)). In *Litwinowicz* v. *Weyerhaeuser Steamship Company*, 179 F. Supp. 812, 817-18 (1959), plaintiff was injured while working in a railroad car placing wooden "chocks" under a draft of steel beams preparatory to their being hoisted aboard the ship. Rejecting defendant's claim that plaintiff was merely preparing the cargo for loading and not doing the actual loading, Kraft, J., well said: "The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiff's actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading."

In the light of these decisions it is clear that plaintiff was engaged in unloading the ship.

(2) It has long been held that the warranty of seaworthiness extends not only to the vessel itself in its hull, gear and stowage, but also to its appurtenant appliances and equipment. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 99 (1944); *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206, 213 (1963). Since the purpose of the doctrine is to protect those in the service of the vessel, the question whether a particular case falls within the scope of the warranty of seaworthiness is answered by determining whether risk incurred falls within the hazard of the service.

As said in *Sieracki:* "[Liability for unseaworthiness] is essentially a species of liability without fault. . . . Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy."

"On principle . . . this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection." (pp. 94-5).

Accordingly the Court has rejected the claim that the shipowner is not responsible for defects in equipment because it was owned and operated by the stevedore rather than the shipowner and was only temporarily aboard the vessel. *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396 (1954); *Rogers* v. *United States Lines,* 347 U. S. 984 (1954). In *Sieracki, Petterson* and *Rogers* the injuries were sustained aboard the vessel by equipment connected to it. Recently in *Gutierrez* the Court expressly held "that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier."[1] (p. 215).

The present case deals with a variant in the factual combinations hitherto considered. The equipment was not

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[1]Similarly, Thompson v. Calmar Steamship Corporation, 331 F. 2d 657 (3 Cir. 1964), cert. denied, 379 U. S. 913; Hagans v. Ellerman & Bucknall Steamship Company, 318 F. 2d 563 (3 Cir. 1963).

on the vessel and neither was the longshoreman at the time of his injury. But he was engaged in the actual work of unloading the cargo from the vessel and he was using equipment which was essential for this purpose. Some of the cases, impressed with the size and nature of modern equipment used for the loading and unloading of cargo, have recoiled from declaring it appurtenant to the ship. Thus it has been said that the coverage of the warranty is limited to equipment commonly found among the ship's gear or at least temporarily adopted by the ship. *McKnight* v. *N. M. Paterson & Sons, Ltd.*, 181 F. Supp. 434 (D. C. Ohio 1960), aff'd 286 F. 2d 250 (6 Cir. 1960), cert. denied 368 U. S. 913 (1961); *Forkin* v. *Furness Withy & Co.*, 323 F. 2d 638 (2 Cir. 1963).[2] In *McKnight* it was held that the shipowner's obligation did not extend to a shore based crane which was loading stevedoring tools into the hold of the ship. Attempting to distinguish the Supreme Court cases the District Court there said: "In the instant situation it cannot be seriously contended that the crane used in the unloading operation is equipment found among the ship's gear. Both its size and sole function rebel against any argument that a ship might 'adopt' or 'integrate' such equipment as part of its gear. . . . The crane never became physically attached to the ship in any manner, nor did it at any time during the unloading process touch any part of the vessel. . . . The vessel owner had no control over the choice of the crane, and no authority in the direction of its use." (181 F. Supp. at 439). Similarly in *Forkin* the shipowner was absolved from liability where

[2]Fredericks v. American Export Lines, 227 F. 2d 450 (2 Cir. 1955), relied on below, was a suit not against the shipowner but the lessee in possession of the pier, and the brief reference to unseaworthiness at the end of the opinion (p. 454) appears to be an intruding observation readily distinguishable from the decision.

the injury was due to a defect in a rope being used to move a conveyor belt into position to load the ship. The court distinguished *Rogers* and *Petterson* as cases where "the defective gear had been brought on board ship and used integrally with the ship's own equipment; the shipowner could have inspected the gear when it came aboard if he had chosen to do so." (p. 641). The Court deemed it important that the shipowner have the power of inspection, and this would arise only when the conveyor was affixed to the ship.

The artificiality of the distinctions suggested in these two cases was well analyzed by the Ninth Circuit in *Huff v. Matson Navigation Company,* 338 F.2d 205 (9 Cir. 1965), cert. ——— U. S. ——. There a longshoreman was injured in the hold of a vessel by a scraper which was part of the stevedore's dockside crane. None of the ship's gear was involved in any way in unloading process and the shipowner had no control over the choice of the crane or the manner of its use. Faced with the claim that a shore based crane could not be considered traditional ship's equipment, the Court first referred to the holding of *Sieracki* that the shipowner's obligations cannot be avioded by a "more modern division of labor" and then noted: "In like manner it seems to us that the well established rule that the shipowner is liable for the results of defects in unloading equipment brought on board by the stevedoring company should not be qualified or modified if the unloading equipment thus used happens to be newly designed and devised and involves none of the traditional unloading gear of the ship. Use of more modern equipment can no more exculpate the shipowner from his obligations than could be use of 'more modern divisions of labor.'" (pp. 212-213). See also *Rodriquez* v. *Coastal Ship Corporation,* 210 F. Supp. 38 (S. D. N. Y. 1962).

The emphasis in *Forkin* on the shipowner's opportunity to inspect as essential to his liability injects into unseaworthiness an element based on negligence, contrary to the repeated holdings of the Supreme Court that liability for unseaworthiness is unlimited by conceptions of negligence. In *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549-50 (1960), the Court summed up the modern view after citing a number of earlier cases: "[T]he decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to excercise reasonable care. . . . [T]he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. . . . What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." We agree with the Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles announced by the Supreme Court.

In the *Huff* case the scraper device reached into the vessel itself and even in some manner was attached to the sides of the hold for purposes of convenience. The Court therefore could have planted its decision on this ground, but it refused to do so, saying: "We do not care to perpetuate any such distinction. We base our refusal to treat the *Forkin* case as an authority upon the broader ground that the basic theory there applied is manifestly wrong and contrary to the controlling decisions. . . ." (p. 215). In the present case the hopper, no less than the crane, was an instrumentality in the unloading of the cargo; it was an essential part of the unloading process. Without its use as a receptacle to be filled and emptied by the injured plaintiff the cargo could not have been unloaded from the vessel. That some other method might have been used

does not eliminate the means used for the unloading of the cargo as a part of the appurtenances to the vessel.

The judgment will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Excerpts From Plaintiff's Deposition

[5] Q. Is that right? A. That's right.

Q. That was on a Saturday? A. Well——

Q. Oh, it's all right, if you don't remember, we'll get it off the calendar. A. I don't remember.

Q. All right, who was your employer on that day, Mr. Spann? A. Employer?

Q. The company that paid you. A. T. Hogan.

Q. And who was the hatch boss on that day? A. Walter Hennessey.

Q. Do you know who the ship boss was? A. Well, I'll say—I don't know.

Q. All right. A. I don't know.

Q. All right, and what ship were you working with? A. That I don't remember.

Q. Where was it that you were working on June 1st? A. The Marine Terminal in Camden, New Jersey.

Q. Were you working on the shore or on the ship? A. I was working on the dock.

[6] Q. Had you worked the day before? A. No.

Q. Had you worked that week at all over in Camden? A. No.

Q. What time did you start work? A. At eight o'clock.

Q. What hatch? A. I would put it this way, I'd rather not say, I don't know definitely.

Q. Was it forward or aft? A. It was aft.

Q. One of the after hatches? A. That's right, I don't know whether it was four or five, I forget.

Q. Were you loading or discharging? A. They were discharging the ship.

Q. And did they discharge in buckets from the ship to the pier? A. That's right, clam bucket.

Excerpts From Plaintiff's Deposition

Q. Well, when the clam bucket went down in the ship and grabbed whatever it was, do you remember what it was? A. Nitrate of soda.

Q. It grabbed that and came over to the dock and did it drop it into a hopper then? [7] A. That's right.

Q. And where did it go from the hopper? A. Into the truck.

Q. Was it a truck that the man drove? A. A truck under the hopper, the man drives the truck under the hopper.

Q. Yes. A. And fulls them up and I tell them to go ahead.

Q. How many men were working on the dock at this particular hatch that you were working at? A. Well, it was two of us.

Q. Who was the other fellow? A. Edgar.

Q. Is that John? A. His name is Edgar.

Mr. Dorfman: Eckles, Nathan Eckles.

By Mr. Biezup:

Q. Did you know him by a nickname. Do you have a nickname for him? A. We call him Laffing Boy.

Q. Okay. And what was your job on the dock, Mr. Spann? A. Loading trucks from the hopper.

Q. And did you operate something loading nitrate of soda into the truck? A. A handle.

[8] Q. And did you pull down on the handle, how did you operate it? A. You pull down on it.

Q. On the lever? A. For it to load the truck and when the truck is loaded you pull back on it.

Q. You don't have to pull back up on it? A. Yes, you pull back up on the handle.

Excerpts From Plaintiff's Deposition

Q. And that closes the hopper? A. That closes the hopper, yes.

Q. And what did your partner, Mr. Eckles, do? A. Well, he was off on a spell.

Q. Did one man operate the hopper at a time? A. Yes.

Q. And when he came off from rest he went over and operated the handle. A. That's right.

Q. Who had the first turn at the handle, you or your partner? A. It was me, I think.

Q. That would be eight to nine or something like that? A. No, go a half hour.

Q. Half an hour? A. Yes.

* * *

[13] The Witness: Well, when you started to ask me—you pull down on the handle to load the truck.

By Mr. Biezup:

Q. Right. A. Understand me? Then you got to pull up on the handle to close it up.

Q. Right. A. You got to pull up on it to close it up, you know what I mean? That's how you load it.

Q. Well, this handle, how long is it? Is it a long handle? A. It's a piece about this long—cross.

Q. A bar about three and half feet long? A. Yes, and got an arm go down into the hopper, you know, you put your handle here.

Q. Yes, there is an arm that goes down in the hopper from there. A. Yes, open the lips up and close it back up to load the truck.

Q. Well, tell me how you got hurt. A. Well, I was up there. I was loading a truck, and when I got through loading that truck I said, "Go ahead."

Excerpts From Plaintiff's Deposition

Q. To the truck driver? [14] A. That's what I said to the truck driver. So it was—I don't know, one of the crane operators, he was passing by, going up to the forward end to get on his crane. So I had my back turned, you know, talking with him. So the man up on the crane, he dig in the hatch and got a bucket full. When he come out, he was still talking to this man over here, you know, so come and drop it in the bucket, the handle dropped down cross my back and drive me to my knees.

Q. And at the time that this handle dropped on your back, you were still talking to the crane operator down on the pier. A. That's right. When it hit me, then I forget all about it.

Q. What was that man's name down on the pier? A. I don't know the man's name.

Q. Nickname. A. I don't know.

Q. Did you ever see him before? A. Yes, I have seen him many times before.

Q. What crane was he going to? A. He was going to the forward end of there. I don't know what hatch, but let me see, he was going up to the forward end.

[18] Q. But how do you kow that the hopper was empty? A. Well, you see when——

Q. When we say empty, we mean reasonably empty. A. Here is what I'm talking about. When I unloaded the back end of the truck and it piled up over the back end over the tail gate, so I had it open, understand what I mean? So it was out as far as I know without looking over in there.

Q. In other words, you could see no nitrate of soda dropping into the rear of the truck. A. Yes, so I closed it up.

Q. All right.

Excerpts From Plaintiff's Deposition

By Mr. Biezup:

Q. I understand you now. Okay, fine. A. I'm glad to get you to understand me.

Q. So when the next load came in, it was dropping into almost an empty hopper, the next load that came in when you were hurt. A. That's right, it was dropping into an empty hopper. It was dropping—as far as I know.

Q. As far as you know, it was dropping—— A. Into an empty hopper.

Q. Okay, and that's when the handle came down and struck you on your back. [19] A. That's right.

Stipulation

In consideration of the Motion for Summary Judgment pending before the Court in this matter, it is hereby agreed and stipulated by and between the parties that the following facts and photographs, Nos. 1 through 9 attached hereto, shall form a part of the record:

1. The hopper is owned by Lavino Shipping Company.

2. The hopper has an opening at the top approximately 14 feet by 11 feet.

3. When full, the hopper holds 8 buckets of nitrate. A bucket holds 1¼ cubic yards. It takes 5 buckets to load a truck.

4. The hopper stands on the pier, unattached to the vessel.

5. The hopper was operated by T. Hogan Corporation.

Excerpts From Plaintiff's Deposition

6. There was no contract between the ship and the stevedore. The charterer, Chilean Nitrate Sales Corp., 120 Broadway, New York, contracted orally with T. Hogan Corporation to perform stevedoring services in connection with unloading the SS Tenna Dan.

7. The crane was shore based on tracks and was owned and operated by Camden Marine Terminal.

8. The cargo was not completely discharged from No. 5 hatch until 11:00 A. M. June 1, 1963, or about one-half hour after the accident.

DORFMAN, PECHNER, SACKS & DORFMAN

By: /s/ John Dorfman
Attorneys for Plaintiff

RAWLE & HENDERSON

By: /s/ John T. Biezup
Attorneys for Defendant

Stipulation

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

ROBERT SPANN,

Plaintiff,

—against—

J. LAURITZEN,

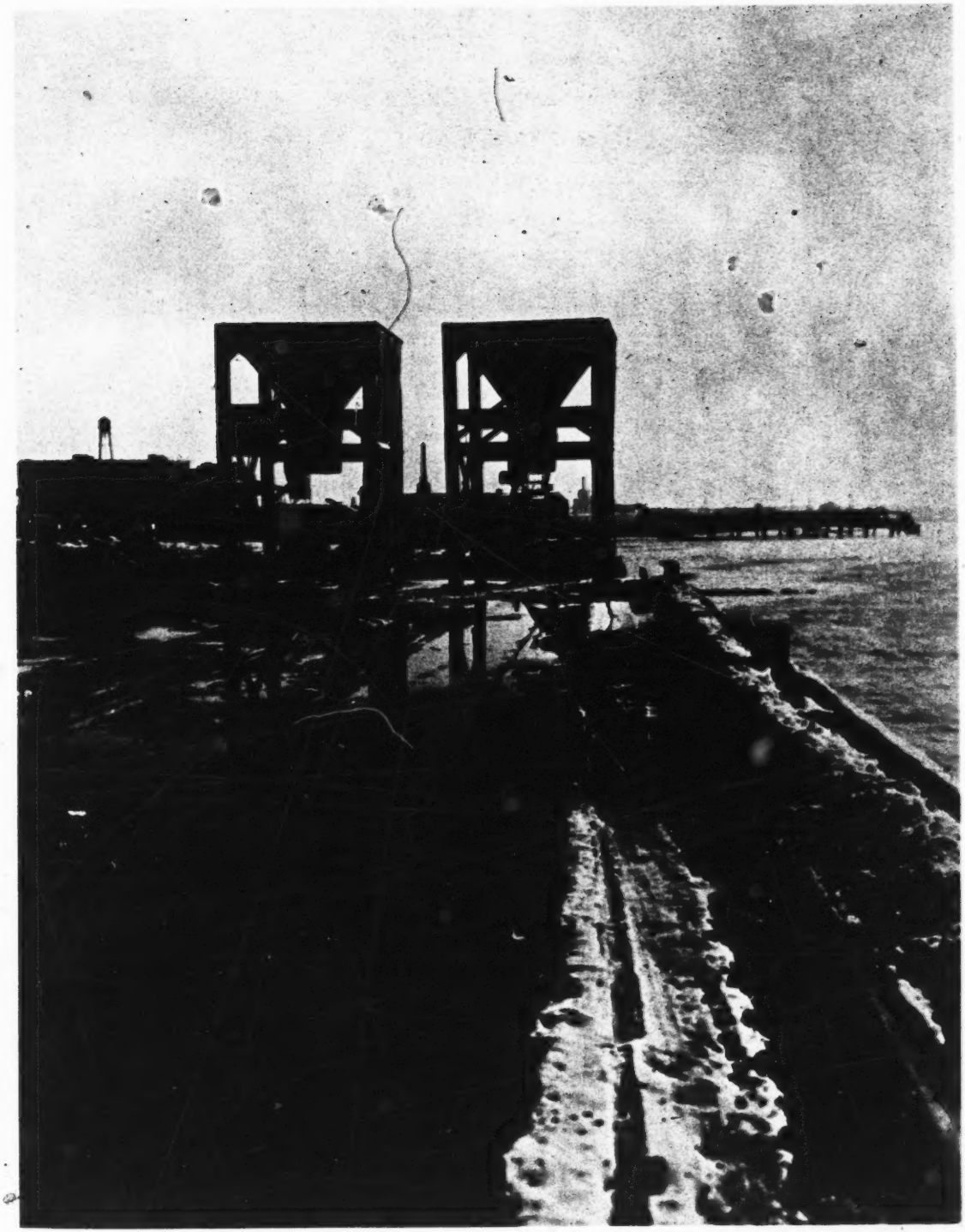
Defendant.

IT IS HEREBY STIPULATED by and between the attorneys for the parties that in addition to photographs 1 through 9 noted in the stipulation on page 22a, photographs 10 and 11 also formed part of the record before the District Court and the Court of Appeals.

Dated: July 13, 1965.

JOHN DORFMAN
DORFMAN, PECHNER, SACKS & DORFMAN
Attorneys for Plaintiff

JOHN T. BIEZUP
RAWLE & HENDERSON
Attorneys for Defendant



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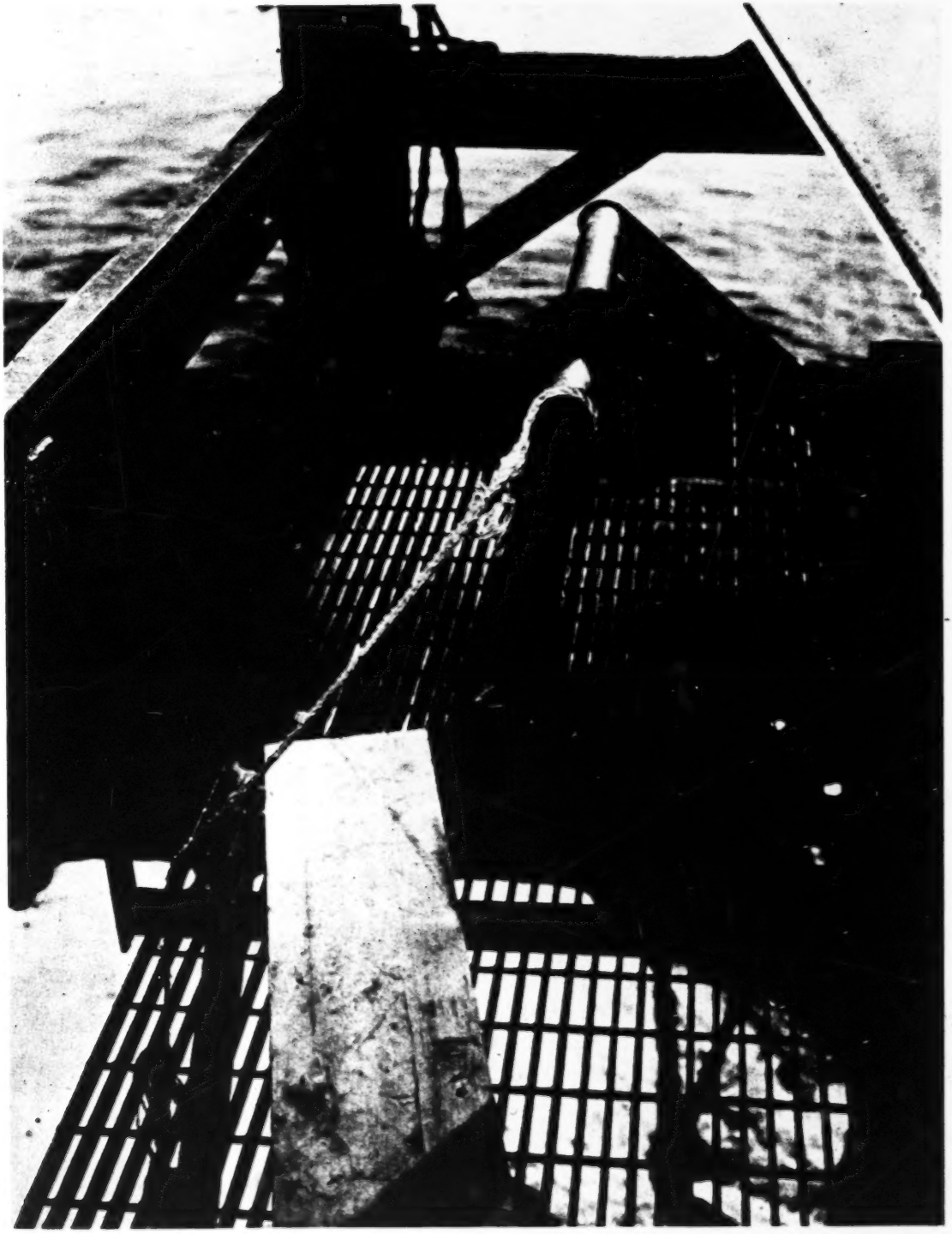

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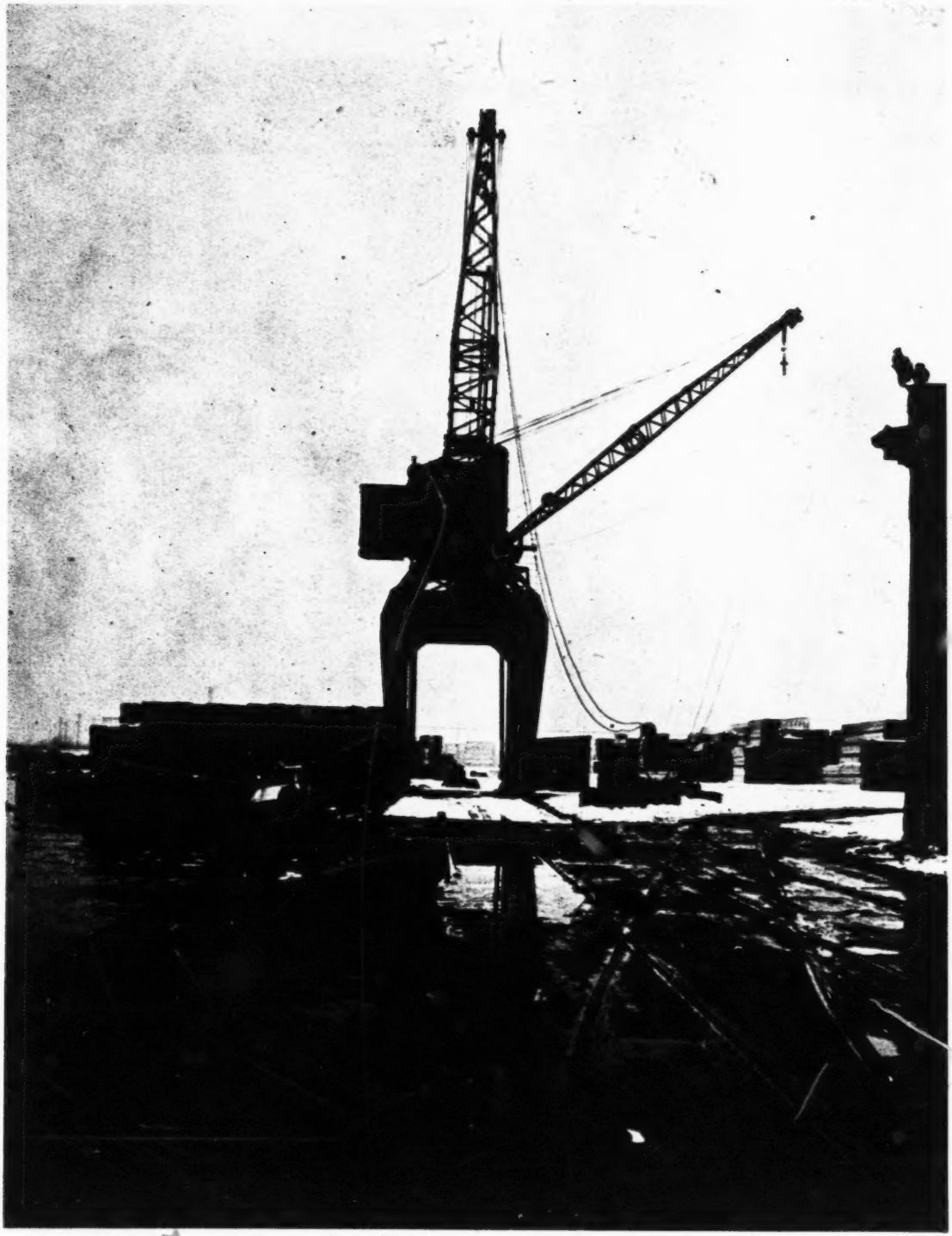

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 352

J. LAURITZEN,

Petitioner,

—against—

ROBERT SPANN,

Respondent.

BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION, AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

J. LAURITZEN, *Petitioner,*

—against—

ROBERT SPANN, *Respondent.*

No. 352

BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION, AS AMICI CURIAE

Consent of Parties

By stipulation between Petitioner and Respondent, dated July 27, 1965, and filed concurrently herewith, consent has been given to file the within Brief Amicus.

Statement of Interest

AMERICAN MERCHANT MARINE INSTITUTE, INC., has a membership of 42 steamship companies, operating cargo, tanker, collier and passenger vessels under the American Flag. The companies have a total vessel tonnage of more than 5,606,500 gross tons, representing about 55% of the American Flag merchant marine operating in foreign and domestic trade. The membership representatives have approved the positions taken herein by counsel for the Institute.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION, is a non-profit corporation, organized under the laws of the

State of California. Its members own and operate merchant vessels under the American Flag, having a total tonnage of approximately 1,000,000 gross tons. These vessels constitute over 90% of all domestic merchant vessels now in service, whose owners have headquarters on the Pacific Coast. The membership representatives have approved of the position taken herein by the Association's counsel.

LAKE CARRIERS' ASSOCIATION, is a voluntary organization of owners and operators of vessels under the American Flag engaged in commerce on the Great Lakes. It has 25 member companies with 226 merchant vessels presently enrolled in the Association. These vessels have an aggregate of more than 1,784,000 gross tons, constituting 97% of all commercial vessels under the American Flag now engaged in domestic commerce on the Great Lakes. The membership representatives have approved the position taken herein by the Association's counsel.

Taken together, the three aforesaid associations may be said to represent the voice of the organized Merchant Marine of the United States, raised in support of the Petition.

Argument of Amici Curiae

The undersigned Associations have submitted this Brief to express their concern over the decision of the Court of Appeals, which not only breaks through the existing limits of maritime jurisdiction, but extends shipowners' liability to a hitherto unrecognized area, and to an uncertain degree.

For the first time, a shipowner may be held liable to a shore-side worker for an alleged defect originating in shore-side equipment, unconnected to the vessel and resulting in a shore-side injury.

The decision below imposes an absolute non-delegable responsibility on the shipowner for equipment, not adopted by the ship as in *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396 (1954) or used on the ship *Italia-Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co., Inc.,* 376 U. S. 315 (1964) or issuing from the ship as in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206 (1963), but wholly outside the vessel owner's sphere of control.

Apart from any power or even opportunity to remedy existing pier conditions, not the least of the complications attendant upon such shore-side accidents, is the likelihood that shipowner's personnel will not witness, hear of or investigate them—a favorable climate for the breeding of fraudulent and collusive claims. The language of Mr. Justice Holmes in *Gooch* v. *Oregon Line Railroad Company,* 258 U. S. 22, 25 (1922) as to the desirability of prompt notice of accidents is just as applicable here for, as he said, the "practice of fraud is too common to be ignored."

With the present division of the Circuits, as stated in the Petition, it would now appear that the Ninth Circuit would unite with the Third Circuit as to the shipowners' responsibility for shore-side men and equipment, while the Sixth Circuit, Second Circuit and probably the Fifth Circuit (*Kent* v. *Shell Oil Company,* 286 F. 2d 746 (1961)) would hold to the contrary.

The undersigned spokesmen for the maritime industry can find no support in precedent, theory or policy for the decision below which has enlarged the maritime jurisdiction and shipowner's liability beyond the existing lines as exemplified in the decisions of the Second, Fifth and Sixth Circuits.

At the present time there exists irreconcilable conflict among certain of the Circuits, and the results of litigation vary according to the particular Circuit in which the action

may have been brought. The maritime industry would want the authoritative voice of this Court to speak out on this subject and restore uniformity to the maritime law.

CONCLUSION

The undersigned Associations representing virtually the entire maritime industry of the United States, respectfully pray that the Petition for a Writ of Certiorari be granted to resolve the important foregoing questions and those stated in the Petition, or in the alternative, that the Court reverse the Court of Appeals on the Petition and reinstate the decision of the District Court.

Respectfully submitted,

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Certificate of Service

I, Cornelius P. Coughlan, one of counsel for American Merchant Marine Institute, Inc., Pacific American Steamship Association and Lake Carriers' Association, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the day of July, 1965, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies of said Brief in sealed envelopes, deposited in the United States Mail at New York, New York, with postage pre-paid and addressed as follows:

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IN THE

Supreme Court of the United States

October Term, 1965

No. 352

J. LAURITZEN, *Petitioner*

v.

ROBERT SPANN, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

No. 352

J. LAURITZEN, *Petitioner*

v.

ROBERT SPANN, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent Robert Spann hereby responds to the petition for writ of certiorari and respectfully requests that the petition be denied.

QUESTIONS PRESENTED

The questions presented are whether a longshoreman is entitled to the warranty of seaworthiness when he is stationed ashore, using shore-based equipment to discharge cargo from a vessel, and whether that equipment, if defective, renders the vessel unseaworthy.

COUNTER-STATEMENT OF THE CASE

Respondent adopts as his counter-statement of the case that portion of the Opinion of the Court below set forth on pages 6a and 7a of the petition.

REASONS FOR DENYING THE WRIT

Breach of the warranty of seaworthiness is a maritime tort and within the maritime jurisdiction when "it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act." *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210.

Admittedly the decision below is in conflict with the decisions of the Second and Sixth Circuits. The Third Circuit, however, is in keeping with the recent decisions in *Huff v. Mason Navigation Company*, 338 F.2d 205 (9th Cir., 1965) *cert. den.* 380 U.S. 943 (1965) and *Metzger v. SS Kirsten Torm*, 245 F. Supp. 227 (D.M.D., July 8, 1965).

These cases correctly state the law as reflected in the decisions of this Court such as *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 96 (1946), where it was stated, "That the owner seeks to have it [the work] done with the advantages of more modern division of labor does not minimize the worker's hazard and should not nullify his protection."

The obligation to provide a seaworthy vessel is not negated because the unsafe equipment creating the dangerous condition belonged to one other than the shipowner. *Alaska Steamship Company v. Peterson*, 347 U.S. 396 (1954).

That the equipment involved is not "traditionally ship's gear" does not render the doctrine of Peterson inapplicable. As this Court said in footnote 3, in *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 317 (1964), "if the owner

engages others to supply the equipment necessary to stevedoring operations, he must still answer to the longshoreman if the gear proves to be unseaworthy."

No valid distinction exists between an unsafe condition created by equipment which is shore-based and an unsafe condition created by equipment physically aboard the ship.

In *Huff v. Matson Navigation Company*, supra, the issues were virtually identical to those presented here, except that in Huff the longshoreman was aboard ship at time of injury and here the longshoreman was on the dock at time of injury. This difference is without legal significance since *Gutierrez*, supra.

CONCLUSION

For the above reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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DORFMAN, PECHNER, SACKS & DORFMAN
Of Counsel

Dated, Philadelphia, Pennsylvania
October 26, 1965.

PETITIONER'S REPLY BRIEF

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IN THE

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October Term, 1965

No. 352

J. LAURITZEN,
Petitioner,

—against—

ROBERT SPANN,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1965

J. LAURITZEN,
Petitioner,
—against—
ROBERT SPANN,
Respondent.

No. 352

PETITIONER'S REPLY BRIEF

Petitioner submits this brief in reply to Respondent's brief in opposition, with the observation that Respondent's effort to be succinct has succeeded only in oversimplifying the issues.

Thus:

(1) Respondent's "Questions Presented" contains an unsupported assumption that the hopper was used "to discharge cargo from a vessel".

(2) The quote from *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206, 210 "that the shipowner commits a tort" begs the very question in issue.

(3) The quote from *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 96 as to modern methods* had reference to the work of loading and unloading the vessel.

*See also Petition p. 13.

(4) It is said that the case of *Huff* v. *Matson Navigation Company,* 338 F. 2d 205, presents issues virtually the same as here, except in that instance "the longshoreman was aboard ship",—hardly a minor distinction. To this, Petitioner must also add that the equipment in *Huff* was (p. 212) "an unloading device" used as a substitute for ship's gear.

As pointed out in the Petition and the Brief Amicus, the decision below is unique in that (a) both the wrong and the injury occurred on the pier and (b) there is imposed on the shipowner an absolute non-delegable responsibility for equipment not adopted by the ship as in *Alaska Steamship Co.* v. *Petterson,* 347 U. S. 396 (1954), or used on the ship as in *Italia-Societa per Azione di Navigazione* v. *Oregon Stevedoring Co., Inc.,* 376 U. S. 315 (1964), or issuing from the ship as in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206 (1963).

CONCLUSION

WITH THE ISSUES SO CLEARLY DELINEATED AND THE FACTS NOT IN DISPUTE, PETITIONER PRAYS THAT THE WRIT BE GRANTED AND, UPON SAID GRANTING, THE DECISION BELOW BE REVERSED AND THE DISTRICT COURT DECISION REINSTATED.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1965

No. 352

J. LAURITZEN,

Petitioner,

—against—

ROBERT SPANN,

Respondent.

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1965

J. LAURITZEN,
Petitioner,
—*against*—
ROBERT SPANN,
Respondent.

No. 352

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays for a rehearing of the denial of its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, which was entered in this Court on December 6, 1965.

REASONS FOR GRANTING THE PETITION FOR REHEARING

Statement

While the petition herein was most certainly denied, it nevertheless must have evoked sufficient interest within the Court to warrant requiring respondent to submit a brief in opposition, when this had been expressly waived. Yet, that brief served only to admit and point up the existing conflict (p. 2). Thus, perplexed by these events, but be-

lieving it had come close, petitioner is prompted to return to the Court with this substantial issue of maritime law, of sufficient gravity to motivate virtually the entire Merchant Marine of the United States to file a Brief Amicus.

Illustrative of the continuing confusion occasioned by this Court's not making a definitive decision in this area are the recent determinations appearing in the Appendix herein.

The within case squarely presents the issue which is (1) not yet decided by this Court (2) as to which admitted conflicts exist among the Courts of Appeals and (3) which it is the responsibility of this Court to resolve in the exercise of its rule-making role in maritime matters.

1. Issue not decided by this Court.

The issue of the responsibility of the shipowner, under the warranty of seaworthiness, for shore based equipment has never been passed upon by this Court. Indeed, the issue was specifically left open by *Roper* v. *United States,* 368 U. S. 20, 24 (1961)

> "This disposition of the case makes it unnecessary for us to pass upon the remaining question, i.e., whether a shore-based marine leg is within the warranty of seaworthiness in the circumstances here disclosed."

2. Acknowledged conflict among the Courts of Appeals.

That there is conflict among the Circuits on this important issue is evident from the decision of the Court of Appeals itself (p. 16a).

> "We agree with the Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles announced by the Supreme Court."

The conflict is also acknowledged in respondent's Brief in Opposition (p. 2)

> "Admittedly the decision below is in conflict with the decisions of the Second and Sixth Circuits."

Conflicts with the *Spann* and *Huff* views, particularly as to the jurisdictional facet of the issue, also appear in decisions of the Fourth Circuit in *Hastings* v. *Mahon,* 340 F. 2d 910 (1965) and the Fifth Circuit in *Kent* v. *Shell Oil Company,* 286 F. 2d 746 (1961). With the exception of the First Circuit, this now represents an involvement of all the major maritime Circuits.

Conflicts among the Courts of Appeals, or even a "seeming conflict," in the maritime field have been consistently recognized by this Court as grounds for granting petitions for certiorari. Thus in *Boudoin* v. *Lykes Brothers,* 348 U. S. 336, 337 (1955), this Court mentioned a "seeming conflict"; in *Romero* v. *International Terminal,* 358 U. S. 354, 358 (1959) "because of the conflict among Courts of Appeals"; in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 542 (1960) "to consider a question of maritime law upon which the Courts of Appeals have expressed differing views."; in *Guzman* v. *Pichirilo,* 369 U. S. 698, 699 (1962) "conflict * * * between the Courts of Appeals"; in *Italia Societa* v. *Oregon Stevedoring,* 376 U. S. 315, 318 (1964) "Because of a conflict between * * *".

The question whether the warranty of seaworthiness has applicability ashore is necessarily intertwined with that of maritime jurisdiction. On this issue this Court said of granting the petition in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206, 209 (1963) "we brought the case here, * * * to resolve the apparently troublesome question as to the shipowner's liability for his torts which have impacts on shore." The question of how far maritime juris-

diction extended ashore was left open (p. 210) but it might be observed that the "far-fetched hypotheticals" noted are now beginning to take shape.*

Similarly in *Kossick* v. *United Fruit*, 365 U. S. 731, 733, (1961) this Court said "We brought the case here because it presented novel questions as to the interplay of state and maritime law", and in *The m/v Tungus* v. *Skovgaard*, 358 U. S. 588, 590 (1959) "Certiorari was granted primarily to consider the relationship of maritime and local law in cases of this kind."

3. By failing to speak out on this and other matters of maritime import, this Court is not fulfilling its traditional "rule fashioning" role.

a. *In General*

This Court has said that courts applying maritime law are "freer than common law courts in fashioning rules" *Halcyon Lines* v. *Haenn*, 342 U. S. 282, 285 (1951). They have "traditional discretion" in developing rules. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 409 (1953). The courts referred to are, of course, Federal Courts, *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 361 (1959), whose ultimate voice and expositor is this Court. In *Wilburn Boat Co.* v. *Firemen's Fund Insurance Co.*, 348 U. S. 310, 314 (1955), this Court acknowledged that it had "fashioned a large part of the existing rules that govern admiralty."

While this Court has reserved to itself this rule-making power, and to the exclusion of State law, see *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 409-410 (1953); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), there has been a recent hesitance about exercising it in the field of maritime injury litigation. Thus, since the

*See *Daniel* v. *Skibs* A/S Hilda Knudsen—Appendix A1.

granting of the petition for certiorari in *Gillespie* v. *United States Steel Corp.*, 375 U. S. 962, January 6, 1964, not a single petition out of 45 filed[1] has been granted in the maritime injury-death field in the ensuing two years, with the exception of the recent decision in *Albanese* v. *N. V. Nederl. Amerik,* No. 523, December 13, 1965, which being summarily reversed in a short decision, settled little but its own outcome.

The language of Mr. Justice Brennan in his dissenting opinion in *United New York-New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U. S. 613, 624 (1959), is equally applicable here where the denial of certiorari can give "no workable guide to the lower courts in this actively litigated field of federal law". His following language finds equal pertinence to the issues here and the proliferating conflicts in the Courts of Appeals, "And so confusion is left to breed further litigation in an already heavily litigated area of the law."

While the burdens of this Court spiral ever upward, and with this Term's reading matter more profuse[2] and possibly gamier than any found in maritime law, the Court should not lose sight of the fact that it is more than an interpreter of the Constitution, against a backdrop of legislative and decisional law fashioned by others. It has an historic and affirmative function of rule-maker in the field of maritime law. In such a role it might seem that proportionately more, not fewer, maritime matters would be accepted for review by this Court.

---

[1] 1963-1964 Term—Nos. 577, 591, 634, 672, 683, 814, 815, 832, 842, 857, 859, 880, 956, 991
1964-1965 Term—Nos. 157 251, 341, 364, 398, 447, 468, 487, 529, 662, 707, 840, 846, 872, 911, 1017, 1020, 1056
1965-1966 Term—Nos. 78, 91, 299, 307, 344, 352, 399, 516, 523, 524, 542, 557, 654

[2] Nos. 42, 49 and 368

In the past two years, such important questions as (a) how far maritime jurisdiction extends ashore,[3] (b) the responsibility of the ship for shore-side equipment,[4] (c) the responsibility of shipowners for operating negligence of longshoremen,[5] have been left to languish unattended by this Court.

b. *In Particular*

Despite the acknowledged conflict, despite the fact that the *Gutierrez* case, 373 U. S. 206, 210, left open the question of how far inland the warranty of seaworthiness will move, despite the fact that the issue has been presented to this Court in ever increasing frequency, first in 1961 in *McKnight* v. *N. M. Paterson & Sons Ltd.*, 368 U. S. 913, and three times in 1965 in *Hastings* v. *Mahon* 380 U. S. 963, *Matson Navigation Company* v. *Huff*, 380 U. S. 943, and finally in the within litigation, despite the unsettled law in this general area, which has prompted one commentator to remark[6]

> "In the course of the years, both Congress and the Supreme Court have attempted to fix the land-based worker's rights. However, it is in this area when the vessel is in port that the Supreme Court has been most 'at sea'."

this Court, by consistently denying certiorari on these issues, has permitted the Courts of Appeals to interpret the maritime law in their separate ways, with a resultant breakdown in the uniformity desired. See e. g. *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-

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[3] See 1954-1965 Term, Nos. 911 and 1017
1965-1966 Term, Nos. 91, 344, 352

[4] 1964-1965 Term, No. 846
1965-1966 Term, No. 352

[5] 1963-1964 Term, No. 991
1964-1965 Term, Nos. 398, 447, 529, 707

[6] *Baer-Admiralty Law of the Supreme Court 1963* Chap. 5 p. 70

246. (1942) The very increased incidence of petitions in this area should motivate the Court to seek a solution to the jurisdictional and substantive questions presented.

Certainly the importance of the issues transcends what might have been a reason for denying certiorari herein, namely the fact that there is not yet any judgment holding the shipowner finally liable. However, the Court of Appeals has finally determined the issue of law as to responsibility of the shipowner for the gear, and nothing more remains to be litigated on that point. Similarly, while the order for a new trial by the Court of Appeals in the recent decision of *Albanese* v. *N. V. Nederl. Amerika et al.,* No. 523—December 13, 1965, did not finally determine the issues therein, this Court not only granted the writ of certiorari, but summarily reversed.

The twin issues of maritime jurisdiction and ship responsibility for shore-side gear, have been here presented in simple form under a stipulated set of facts and are capable of a broad, settling decision. The Court should delay no longer in making the disposition that will inevitably have to be made.

CONCLUSION

FOR THE FOREGOING REASONS IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR REHEARING AND THE WRIT BE GRANTED.

December 30, 1965.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

New York, N. Y.,
December 30, 1965.

(s) J. WARD O'NEILL
Counsel for Petitioner

APPENDIX

1. *Daniel* v. *Skibs A/S Hilda Knudsen,* was tried in October of 1965 in the Eastern District of Pennsylvania, Civil No. 30778 before the Honorable Joseph S. Lord III and a jury. The quotes are from the charge which followed the *Spann* decision.

Daniel worked in a warehouse in Camden, New Jersey, "approximately half a block from where the ship was". He was "not transferring the bales of licorice from the hold of the ship to the flat car; he was not transferring the bales of licorice from the flat car to the warehouse. When Mr. Daniel entered the picture that had already been done. He was engaged in hooking-on with these tongs to the bales of licorice for the purpose of stacking them in the warehouse." An "engine . . . pulled the flat cars down to the warehouse." While stacking the bales in the warehouse a piece of rope attached to the tongs broke. Plaintiff claimed that he was owed the warranty of seaworthiness by reason of the condition of the rope in the warehouse.

The District Court, following *Spann,* left it to the jury to decide whether or not plaintiff "was actually engaged in unloading the vessel at the time of his injury, whether or not the work that he was doing was an essential part of the actual unloading of the vessel."

If the answer to that question was yes, then the Court held that whatever was used therein, i.e., the rope in the warehouse "is an appurtenance of the ship because it is used in connection with the loading, if you so find." The jury found for the plaintiff on October 19, 1965.

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2. In contrary District Court decision, in the Eastern District of Louisiana, Baton Rouge Division, CA3069,

Appendix

Dugas v. *N. Y. K. Line,* a longshoreman working on the ship was struck by a dockside crane during the course of the operation. On November 4, 1965, the Honorable E. Gordon West directed a verdict, stating in an oral opinion from the bench that no warranty of seaworthiness was owed to the injured longshoreman since the crane was not attached to the vessel. No written opinion was handed down.